

U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)



Issue Date: 27 September 2006

Case No.: 2005-BLA-05366

In the Matter of

E.S.

Claimant

v.

**LEECO, INC.,
c/o ACORDIA EMPLOYERS SERVICE,
SELF-INSURED THROUGH
JAMES RIVER COAL COMPANY
c/o EMPLOYERS SERVICE**
Self-Insured Employer

and

**DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS**
Party-in-Interest

Appearances:

Monica Rice Smith, Esquire
For Claimant

John H. Baird, Esquire
For Employer

Before: **ROBERT D. KAPLAN**
Administrative Law Judge

DECISION AND ORDER
DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.¹

¹ The regulations cited are the amended regulations that became effective on January 19, 2001. 20 C.F.R. Parts 718 and 725.

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a disease of the lungs resulting from coal dust inhalation.

On December 17, 2004, this case was referred to the Office of Administrative Law Judges for a formal hearing. Subsequently, the case was assigned to me. The hearing was held before me in London, Kentucky, on April 25, 2006, where the parties had full opportunity to present evidence and argument.² Briefs were not filed. The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.

I. ISSUES

The parties stipulated that Claimant has established 29 years of coal mine employment, one dependent, and that Leeco, Inc. is the responsible operator. (T 8)³ I find the record supports these stipulations. The following issues are presented for adjudication:

- (1) whether Claimant has pneumoconiosis;
- (2) whether Claimant's pneumoconiosis arose out of his coal mine employment;
- (3) whether Claimant is totally disabled; and
- (4) whether Claimant's total disability is due to pneumoconiosis.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural Background

Claimant filed this claim for benefits on January 30, 2004. (DX 2) On September 21, 2004, the District Director denied Claimant benefits, finding he had established the existence of pneumoconiosis arising out of coal mine employment but had failed to establish that he was totally disabled. (DX 21) Claimant requested a formal hearing on October 4, 2004. (DX 23)

B. Factual Background

Claimant was born on January 9, 1954. (T 10) He married G.S. on July 4, 1991. (DX 9) He claims no other dependents for purposes of augmentation of benefits. (DX 2) Claimant provided testimony at the hearing and in deposition testimony taken January 17, 2005.

²Employer's attorney stated that he would be submitting the deposition of Dr. Matt Vuskovich post-hearing as EX 5 (T 6-7) However, Dr. Vuskovich's deposition was never received by this office.

³ The following abbreviations are used herein: "CX" refers to Claimant's Exhibit; "DX" refers to Director's Exhibits; "EX" refers to Employer's Exhibits; and "T" refers to the transcript of the April 25, 2006 hearing.

Claimant testified that he last worked as a coal miner on April 24, 2003, when he was injured in a rock fall. (T 11, 15, 21; EX 1 at 10) He worked many jobs, including that of roof bolter, shuttle car operator, mechanic, carrier, belt line shoveler, and miner operator. All of his work was underground and at the face of the mine. He described all of his jobs as dusty.

Claimant primarily was, as he called it, a “low low man” or bridge carrier operator. (T 13; EX 1 at 10) He explained that the carrier is like a small dozer with a steel conveyor chain in the middle of it that attaches to the machine, and when the miner cuts the coal it dumps it onto the bridge conveyor and sends it onto the belt. (EX 1 at 10) When that equipment reversed, Claimant had to get the cable out of its way. This was primarily a seated job, and Claimant testified that he probably could have continued in that capacity but for his rock fall injuries. (EX 1 at 21) Claimant testified that he also kept the belt line shoveled. (T 13-14) He performed this job for the last eight to nine years of his employment. (T 15; EX 1 at 11)

Claimant testified that he suffers from Black Lung and that he began having breathing problems about five years ago. (EX 1 at 12-13) He also has a rotator cuff injury, disc problems in his neck and low back, as well as a pinched nerve that radiates down his right leg, and arthritis in his neck and back, all as a result of the rock fall injury. He treats with Dr. Carter every three months for these problems, as well as his lungs. (T 24; EX 1 at 8) Claimant testified that he takes Ultracet for his back, sleeping pills for nightmares caused by the rock fall, and the inhaler Albuterol. (T 16; EX 1 at 17, 24) He uses the inhaler two to four times a day. Claimant also complained of smothering at night, a cough, and breathing problems that worsen with exercise. (T 16-17) He stated that when he walks up stairs or fifty yards on level ground, his breathing gets harder. He can no longer mow his lawn or hunt, but he continues to fish. (T 9) Claimant asserted that he smoked one-half pack of cigarettes a day from the age of 20 until about six or seven years ago, for a total of about 25 years. (T 22-23; EX 1 at 25-26)

Claimant receives Social Security disability benefits as a result of the work-related injury. He began receiving these monthly payments of about \$1600 in June 2005. (T 21-22) He also receives a state workers’ compensation award based on his back and neck injury. It is a seven-year award that pays him about \$426 every two weeks. (T 22)

C. Entitlement

Because this claim was filed after the effective date of the Part 718 regulations, Claimant’s entitlement to benefits will be evaluated under the Part 718 standards. § 718.2. In order to establish entitlement to benefits under Part 718, Claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) the miner suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) the miner is totally disabled, and (4) the miner’s total disability is caused by pneumoconiosis. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

D. Elements of Entitlement

1. Presence of Pneumoconiosis

There are four means of establishing the existence of pneumoconiosis, set forth at § 718.202(a)(1) through (a)(4):

- (1) X-ray evidence. § 718.202(a)(1).
- (2) Biopsy or autopsy evidence. § 718.202(a)(2).
- (3) Regulatory presumptions. § 718.202(a)(#).
 - a) § 718.304 – Irrebuttable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis.
 - b) § 718.305 – Where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment.
 - c) § 718.306 – Rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978 and was employed in one or more coal mines prior to June 30, 1971.
- (4) Physician's opinion based upon objective medical evidence. § 718.202(a)(4)

X-ray evidence, § 718.202(A)(1)

Under § 718.202(a)(1), the existence of pneumoconiosis can be established by chest X-rays conducted and classified in accordance with § 718.102. The current record contains the following chest X-ray evidence.⁴

| DATE of X-RAY | DATE READ | EX. NO. | PHYSICIAN | RADIOLOGICAL CREDENTIALS | I.L.O. CLASS |
|---------------|------------|---------|-------------|--------------------------|--------------|
| 02/23/2004 | 01/30/2005 | EX 7 | Dr. Wiot | BCR, B-reader | Negative |
| 09/02/2004 | 09/02/2004 | DX 11 | Dr. Simpao | – | 2/2 |
| 09/02/2004 | 09/14/2004 | DX 11 | Dr. Barrett | BCR, B-reader | Quality 1 |
| 09/02/2004 | 03/27/2006 | EX 6 | Dr. Wiot | BCR, B-reader | Negative |

⁴ A B-reader (“B”) is a physician who has demonstrated a proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. § 37.51. A physician who is a Board-certified radiologist (“BCR”) has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. § 727.206(b)(2)(iii) (2001).

| | | | | | |
|------------|------------|------|------------|----------|-----|
| 05/18/2005 | 05/18/2005 | EX 2 | Dr. Broudy | B-reader | 0/1 |
|------------|------------|------|------------|----------|-----|

It is well-established that the interpretation of an X-ray by a B-reader may be given additional weight by the fact-finder. Aimone v. Morrison Knudson Co., 8 B.L.R. 1-32, 34 (1985); Martin v. Director, OWCP, 6 B.L.R. 1-535, 537 (1983); Sharpless v. Califano, 585 F.2d 664, 666-7 (4th Cir. 1978). The Benefits Review Board has also held that the interpretation of an X-ray by a physician who is a B-reader as well as a Board-certified radiologist may be given more weight than that of a physician who is only a B-reader. Scheckler v. Clinchfield Coal Co., 7 B.L.R. 1-128, 131 (1984). In addition, a judge is not required to accord greater weight to the most recent X-ray evidence of record, but rather, the length of time between the X-ray studies and the qualifications of the interpreting physicians are factors to be considered. McMath v. Director, OWCP, 12 B.L.R. 1-6 (1988); Pruitt v. Director, OWCP, 7 B.L.R. 1-544 (1984); Gleza v. Ohio Mining Co., 2 B.L.R. 1-436 (1979).

The chest X-ray taken on February 23, 2004, was interpreted as negative by Dr. Wiot, who is a Board-certified radiologist and B-reader. Based on his credentials and the lack of any contrary reading, I find this X-ray negative for the presence of pneumoconiosis.

The September 2, 2004, chest X-ray was interpreted as positive by Dr. Simpao, who possesses no particular qualifications for the interpretation of X-rays. In a report dated September 14, 2004, Dr. Barrett read the film for quality purposes only and found it to be of the best diagnostic quality. He is a Board-certified radiologist and B-reader. Dr. Wiot read the X-ray as negative for pneumoconiosis. Based on the superior radiological credentials of Dr. Wiot, I give his opinion greater weight than the contrary opinion of Dr. Simpao. Consequently, I find that the September 2, 2004 X-ray is negative for pneumoconiosis.

The chest X-ray taken on May 18, 2005, was interpreted as negative by Dr. Broudy, a B-reader who is Board-certified in internal medicine and pulmonary disease. It was not reread. Accordingly, I find that the chest X-ray is negative for the presence of pneumoconiosis.

Considering all of the X-ray evidence together, I find that the weight of the X-ray evidence does not support a finding of the presence of pneumoconiosis.

Biopsy or autopsy evidence, § 718.202(a)(2)

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. § 718.202(a)(2). That method is unavailable here, because the current record contains no such evidence.

Regulatory presumptions, § 718.202(a)(3)

A determination of the existence of pneumoconiosis may also be made by using the presumptions described in §§ 718.304, 718.305, and 718.306. Section 718.304 requires X-ray, biopsy or equivalent evidence of complicated pneumoconiosis. This section is not applicable because there is no evidence of complicated pneumoconiosis. Section 718.305(c) is not applicable because this claim was filed after January 1, 1982, and § 718.306 is only applicable in

the case of a deceased miner who died before March 1, 1978. As none of these presumptions is applicable, the existence of pneumoconiosis has not been established under § 718.202(a)(3).

Physicians' opinions, § 718.202(a)(4)

The fourth way to establish the existence of pneumoconiosis under § 718.202 is set forth as follows in subparagraph (a)(4):

A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

Section 718.201(a) defines pneumoconiosis as “a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment” and “includes both medical, or ‘clinical,’ pneumoconiosis and statutory, or ‘legal,’ pneumoconiosis.” Section 718.201(a)(1) and (2) defines clinical pneumoconiosis and legal pneumoconiosis. Section 718.201(b) states:

[A] disease “arising out of coal mine employment” includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

As the physicians providing opinions regarding the presence of pneumoconiosis considered the laboratory studies, these are set forth below.

The record contains the pulmonary function studies summarized below.

| DATE | EX NO. | PHYSICIAN | AGE | FEV ₁ | FVC | MVV | FEV ₁ /FVC | EFFORT | QUALIFIES |
|-------------------------|--------|-------------|-----|------------------|---------------|-------------|-----------------------|---------------|-----------|
| 02/23/2004 ⁵ | DX11 | Dr. Simpao | 50 | 2.63 | 3.80 | 86 | 69% | Good | No |
| 01/27/2005 | EX 4 | Dr. Repsher | 51 | 3.17 | 4.26 | 93 | 74% | Good | No |
| 05/18/2005 | EX 2 | Dr. Broudy | 51 | 2.97 3.02* | 4.32 4.31* | 112 100* | 68% 70%* | Good Good* | No No* |

*post-bronchodilator

The record contains the arterial blood gas studies summarized below.

| DATE | EX. NO. | PHYSICIAN | PCO ₂ | PO ₂ | QUALIFIES |
|------------|---------|------------|------------------|-----------------|-----------|
| 02/23/2004 | DX 11 | Dr. Simpao | 37.4 | 89.0 | No |
| 05/18/2005 | EX 2 | Dr. Broudy | 37.3 | 90.8 | No |

*post-exercise

⁵This study was found valid by Dr. Vuskovich in his report dated February 1, 2005. (EX 3)

The record contains the following physicians' opinions.

Dr. Valentino Simpao

Dr. Valentino Simpao⁶ examined Claimant at the behest of the Director, OWCP on February 23, 2004, and issued a report on the same day. The physician credited Claimant with 29 years of coal mine employment and considered a 22-year smoking history at a rate of one-half pack of cigarettes a day. Dr. Simpao relied on his physical examination of Claimant, a chest X-ray dated September 2, 2004⁷, and a pulmonary function study, EKG, and an arterial blood gas study all dated February 23, 2004. The physician noted that Claimant's medical history was significant for frequent colds, attacks of wheezing, arthritis of the knee, back, hands, and toes, and the injuries sustained from the 2003 rock fall. Claimant reported having a productive cough for two months, wheezing with exertion, dyspnea for six to seven years, chest tightness sometimes with rest for the last five to six years, and some paroxysmal nocturnal dyspnea. On physical examination, Dr. Simpao found forced wheezing on exhalation and increased resonance in the upper chest and axillary area on percussion. The physician opined that Claimant's chest X-ray was consistent with coal workers' pneumoconiosis, and he opined that the cause of the disease was multiple years of coal dust exposure. (DX 11)

Dr. Bruce C. Broudy (Board-certified in internal medicine and pulmonary disease) examined Claimant at the behest of the Employer on May 18, 2005, and provided a report on the same date. (EX 2) The physician credited Claimant with 30 years of coal mine employment and considered a 25-year smoking history at a rate of one-half to one pack of cigarettes a day. Dr. Broudy relied on his physical examination of Claimant, a chest X-ray, pulmonary function study, CT scan⁸, and an arterial blood gas study all dated May 18, 2005. The physician noted that Claimant's medical history was significant for an appendectomy, a muscle injury to the left forearm, a back injury that preceded the rock fall, and the injuries resulting from the rock fall. Claimant reported having a chronic pain and immobility in the neck and low back, trouble with any activity, awakening at night, dyspnea on exertion for the last ten years, and shortness of breath going up hills. On physical examination, Dr. Broudy found good aeration and flow with slight expiratory delay and wheezing on forced expiration. The physician opined that Claimant's chest X-ray was negative for coal workers' pneumoconiosis and that the CT scan of the chest confirmed a slight increase in interstitial opacities but no large opacities or pleural disease. Dr. Broudy diagnosed a very mild chronic obstructive airways disease attributable to cigarette smoking. He further found a very slight airway obstruction on spirometry that he felt was due to

⁶Claimant has appended to Dr. Simpao's curriculum vitae a listing of unknown source that seems to represent Dr. Simpao as being Board-certified in internal medicine and pulmonary disease. (CX 1) However, according to the American Board of Medical Specialties web site, www.abms.org, Dr. Simpao is not Board certified. Accordingly, I do not consider him to be a Board-certified physician.

⁷Dr. Simpao initially read a February 23, 2004 chest X-ray as category 2/2 pneumoconiosis, but repeated the X-ray on September 2, 2004 because the prior film was digital and did not meet ILO standards, according to his letter of September 2, 2004. (DX 11) He read the later film the same as the first.

⁸The CT scan report is not in the record.

smoking. He explained that the lung volumes showed some hyperinflation and air trapping that are consistent with emphysematous change due to cigarette smoking.

I find the opinion of Dr. Broudy to be reasoned and well documented. An opinion is well reasoned when it is based on evidence such as physical examination, symptoms, and other adequate data to support the physician's conclusions. See Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987); Hess v. Clinchfield Coal Co., 7 B.L.R. 1-295 (1984). A medical opinion is adequately documented if it is based on items such as a physical examination and an accurate smoking history and report of coal mine employment. See Perry v. Director, OWCP, 9 B.L.R. 1-1 (1986). Dr. Broudy considered Claimant's employment, smoking, and medical histories, the negative chest X-ray reading, and the results of the objective medical testing in reaching the conclusion that Claimant does not have pneumoconiosis. More persuasive is that Dr. Broudy's conclusion is supported by the two negative X-ray readings of Dr. Wiot, who is the best-qualified X-ray interpreter in this case. Finally, Dr. Broudy's credentials as a Board-certified internist and pulmonary specialist merit greater weight. Scott v. Mason Coal Co., 14 BLR 1-38 (1990). Accordingly, I place great weight on Dr. Broudy's opinion.

Dr. Simpao's opinion is also well documented. He considered Claimant's employment, smoking, and medical histories, the positive chest X-ray reading, and the results of the objective medical testing in reaching his conclusion that Claimant has pneumoconiosis. Dr. Simpao did not explain, however, how he arrived at his diagnosis but for the X-ray interpretation. He did not, for example, address Claimant's long smoking history and whether that could have accounted for the X-ray changes he saw. Furthermore, a diagnosis of pneumoconiosis based only on an X-ray and a report of coal mine employment history may be given diminished weight. Lafferty v. Cannelton Industries, Inc., 12 BLR 1-190 (1989); Cornett v. Benham Coal, Inc., 227 F.3d 569 (6th Cir. 2000). I find that Dr. Simpao's opinion is outweighed by Dr. Broudy's opinion that Claimant does not have pneumoconiosis.

As noted above, the chest X-ray evidence does not support a finding of the presence of pneumoconiosis. The medical opinion evidence also fails to support a finding of the presence of pneumoconiosis. Weighing all of the evidence together, I find that Claimant has failed to establish the presence of pneumoconiosis.

2. Pneumoconiosis Arising Out of Coal Mine Employment

The regulations provide that a miner who was employed for at least ten years in coal mine employment is entitled to a rebuttable presumption that pneumoconiosis arose out of coal mine employment. § 718.203(b). However, where a miner has established fewer than ten years of coal mine employment, "it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship." § 718.203(c). The parties have stipulated that Claimant has established a coal mine employment history of 29 years, and, therefore, he would be entitled to the rebuttable presumption if he had established the existence of pneumoconiosis. However, because he has not, this issue is moot.

3. Total Disability

Claimant must establish that he is totally disabled due to a respiratory or pulmonary condition. Section 718.204(b)(1) provides as follows:

[A] miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner

- (i) From performing his or her usual coal mine work; and
- (ii) From engaging in gainful employment . . . in a mine or mines . . .

§ 718.204(b)(1).

Nonpulmonary and nonrespiratory conditions which cause an “independent disability unrelated to the miner’s pulmonary or respiratory disability” have no bearing on total disability under the Act. § 718.204(a); see also, Beatty v. Danri Corp., 16 B.L.R. 1-1 (1991), aff’d as Beatty v. Danri Corp. & Triangle Enterprises, 49 F.3d 993 (3d Cir. 1995).

Claimant may establish total disability in one of four ways: pulmonary function study; arterial blood gas study; evidence of cor pulmonale with right-sided congestive heart failure; or reasoned medical opinion. § 718.204(b)(2)(i-iv). Producing evidence under one of these four ways will create a presumption of total disability only in the absence of contrary evidence of greater weight. Gee v. W.G. Moore & Sons, 9 B.L.R. 1-4 (1986). All medical evidence relevant to the question of total disability must be weighed, like and unlike together, with Claimant bearing the burden of establishing total disability by a preponderance of the evidence. Rafferty v. Jones & Laughlin Steel Corp., 9 B.L.R. 1-231 (1987).

In order to establish total disability through pulmonary function tests, the FEV₁ must be equal to or less than the values listed in Table B1 of Appendix B to this part and, in addition, the tests must also reveal either: (1) values equal to or less than those listed in Table B3 for the FVC test, or (2) values equal to or less than those listed in Table B5 for the MVV test or, (3) a percentage of 55 or less when the results of the FEV₁ test are divided by the results of the FVC tests. § 718.204(b)(2)(i)(A-C). Such studies are designated as “qualifying” under the regulations. Assessment of pulmonary function study results is dependent on Claimant’s height, which was noted in the current records as 66 inches, 66 inches, and 65 inches. I have used the average of the three heights, 65.6 inches, in evaluating the studies. Protopappas v. Director, OWCP, 6 B.L.R. 1-221 (1983).

As set forth above, the pulmonary function studies did not yield qualifying results under the regulations. Consequently, I find that the weight of the pulmonary function study evidence does not support a finding of total disability pursuant to § 718.204(b)(2)(i).

The results of both of the arterial blood gas studies were non-qualifying under the regulations. Therefore, I find that the arterial blood gas studies do not support a finding of total disability pursuant to § 718.204(b)(2)(ii).

Under § 718.204(b)(2)(iii), total disability can also be established where the miner had pneumoconiosis and the medical evidence shows that he suffers from cor pulmonale with right-sided congestive heart failure. There is no record evidence of cor pulmonale with right-sided congestive heart failure.

The remaining means of establishing total disability is with the reasoned medical judgment of a physician that Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable and gainful work. Such an opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. § 718.204(b)(2)(iv).

The record contains the medical opinions of Drs. Simpao and Broudy. Dr. Simpao found that the pulmonary function study showed a mild obstructive airway disease, but the arterial blood gas study was normal. Dr. Simpao described Claimant's impairment as mild and stated that coal dust exposure played a significant part in the cause of that impairment. I do not consider this equivalent to a finding of total disability. Dr. Simpao diagnosed only a mild impairment and did not assert that it would prevent Claimant from performing his last coal mining job. Dr. Simpao's opinion is supported by the pulmonary function and arterial blood gas studies that he administered. I find his opinion well reasoned and documented, and afford it full weight.⁹

In Dr. Broudy's opinion, Claimant retains the respiratory capacity to perform the work of an underground coal miner. Dr. Broudy found no evidence of any disabling respiratory impairment. Dr. Broudy's opinion is well documented and reasoned. It is supported by the objective data he reviewed, which, in fact, showed improvement more than a year after the studies conducted by Dr. Simpao. Based also on Dr. Broudy's qualifications, I give full weight to his opinion.

As previously noted, the pulmonary function tests and arterial blood gas studies do not establish total disability. The medical opinion evidence also fails to establish total disability. All of this evidence is entitled to great weight. Based on the foregoing, I find that Claimant has not established Claimant has not established this element of entitlement.

4. Total Disability Due to Pneumoconiosis

As Claimant has failed to establish the presence of pneumoconiosis under § 718.202(a) and total disability under § 718.204(b)(2), Claimant cannot establish total disability due to pneumoconiosis under § 718.204(c)(2).

⁹ Claimant's counsel incorrectly states that Dr. Simpao opined that "the Claimant did not have the respiratory capacity to perform the work of a coal miner or to perform comparable work. . . ." (Claimant's Brief, p.5) I do not find any such statement by Dr. Simpao in the record.

E. Conclusion

As Claimant has failed to establish any of the elements of entitlement, he is not entitled to benefits under the Act.

ATTORNEY FEE

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation services rendered in pursuit of the claim.

ORDER

The claim of E.S. for benefits under the Act is DENIED.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).